91-312 (1)

IN THE

Supreme Court of the United States

October Term, 1991

GARY L. SIBEN, MICHELE SIBEN, SIDNEY SIBEN, STELLA SIBEN, STEPHEN G. SIBEN, EILEEN L. SIBEN, WALTER SIBEN and LILLIAN SIBEN,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING THE DENIAL OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW.

1) Whether the rule set forth in *Fendell v. Commissioner*, 906 F. 2d 362 (9th Cir. 1989), bars the assessment of tax against limited partners of a partnership more than three years after the filing of the partnership income tax return under the following circumstances? All of the tax in question was generated by "pass-through" items from the partnership. The partnership itself did not extend its own Statute of Limitations, but the Statute of Limitations on the partners' individual income tax returns was extended.

2) Whether the rule set forth in *Fendell v. Commissioner*, 906 F. 2d 362 (9th Cir. 1989), correctly states the law? The rule bars the assessment of income taxes generated by "pass-through" items against the recipient at a time when the

Statute of Limitations has run against the entity itself, notwithstanding the execution of an agreement to extend the Statute of Limitations by the recipient.

LIST OF PARTIES.

All of the parties are listed in the caption.

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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

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PETITION FOR A WRIT OF CERTIORARI.

REFERENCE TO OFFICIAL REPORTS.

The Tax Court Opinion is not officially reported. It is unofficially reported at 60 TCM 524, T.C. Memo 1990-435. The Circuit Court Opinion is reported officially at 930 F.2d 1034 (2d Cir. 1991), and unofficially at 91-1 U.S.T.C. Para. 50,215.

GROUNDS UPON WHICH JURISDICTION IS INVOKED.

(1) The date upon which the Circuit Court Judgment was issued was April 18, 1991.

(2) The Petitioners' Petition for Rehearing was denied on May 31, 1991, and no order was sought respecting an extension of time to file a Petition for Certiorari.

(3) This Petition for a Writ of Certiorari is authorized under 28 U.S.C. Section 1254(1).

STATUTES.

26 U.S.C. Section 6501(a):

(a) General rule. - Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

26 U.S.C. Section 6031(a):

(a) General rule. - Every partnership (as defined in section 761[a]) shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowable by subtitle A, and such information for the purpose of carrying out the provisions of subtitle A as the Secretary may by forms and regulations prescribe, and shall include in the return the names

and addresses of the individuals who would be entitled to share in the taxable income if distributed and the amount of the distributive share of each individual.

STATEMENT OF THE CASE.

This case concerns a Petition to the United States Tax Court for the redetermination of deficiencies in income taxes for the years 1979 and 1980. Taxpayers filed a Motion for Summary Judgment on the ground that the Statute of Limitations for the assessment and collection of such taxes had expired prior to the issuance of the Notices of Deficiency. The Tax Court denied the Motion by Order dated August 14, 1990. The taxpayers then filed Petitions in the Tax Court, and subsequently in the Second Circuit, for leave to file an interlocutory appeal of that Order. Permission was granted by both Courts. On the

merits, the United States Court of Appeals for the Second circuit affirmed the Order of the Tax Court denying the Motion.

Taxpayers each filed individual income tax returns, Forms 1040, for the years 1979 and 1980 on a timely basis. Prior to the expiration of the ordinary three year period of limitations, set out in 26 U.S.C. Section 6501(a), they extended the Statute of Limitations for their individual tax liabilities for these years by written agreement, pursuant to 26 U.S.C. Section 6501(c)(4), for an indefinite period. On September 18, 1984, taxpayers each terminated the said consent in writing. Pursuant to the terms of this notice, this termination became effective ninety days later. On December 3 and 4, 1984, less than ninety days later, the Commissioner issued Notices

of Deficiency to each petitioner, pursuant to 26 U.S.C. Section 6212.

The entire change in tax for each petitioner derived from proposed adjustments to the income and deductions generated by the petitioners' investment in a partnership known as Baltic Realty, Ltd. (hereinafter "Baltic"). For each of the taxable years 1979 and 1980, Baltic filed Form 1065, which is a partnership income tax return. They were filed on August 15, 1980 and April 15, 1981, respectively. Baltic did not enter into an agreement with respondent to extend the Statute of Limitations on its taxable years. The Notices of Deficiency, issued on December 3 and 4, 1984, were each issued more than three years after the partnership income tax returns were filed.

STATEMENT OF APPELLATE JURISDICTION.

Jurisdiction over this interlocutory appeal from the Order Denying Petitioners' Motion for Summary Judgment issued by the United States Tax Court was granted to the United States Circuit Court of Appeals by the provisions of 26 U.S.C. Section 7482(a) and 28 U.S.C. Section 1291. Appeal to the United States Court of Appeals for the Second Circuit was proper pursuant to the provisions of 28 U.S.C. Section 1294.

BASIS OF FEDERAL JURISDICTION.

Federal Court jurisdiction over the petition to the United States Tax Court is granted to the Tax Court pursuant to the provisions of 26 U.S.C. Sections 6214(a) and 7442.

ARGUMENT.

I. THE WRIT SHOULD BE GRANTED DUE TO A CONFLICT BETWEEN THE CIRCUITS.

In considering whether to issue a Writ of Certiorari, one important factor is the existence of a conflict between the Circuit Courts of Appeals. *United States v. Donruss Co.*, 89 S.Ct. 501, 393 U.S. 1112, 21 L.Ed. 2d 812. As demonstrated below, there is a conflict between the rule set down by the Eighth and Ninth Circuits, and the result in the case at bar.

In *Kelly v. Commissioner*, 877 F. 2d 756 (9th Cir. 1989), rev'g T.C. Memo 1986-405, the Ninth Circuit was faced with a situation nearly identical to the case at bar. In that case, the taxpayers were husband and wife, one of whom owned fifty percent of the stock of a corporation which had filed an election

to be taxed under the provisions of Subchapter S. More than three years after their individual income tax return, Form 1040, and the corporation's income tax return, Form 1120S, were filed, the Commissioner of Internal Revenue attempted to assess additional taxes against the individuals. All of the adjustments were based upon changes to the corporation's income tax return, which were then "passed-through" to the individual shareholders under the provisions of Subchapter S. The individuals had entered into an agreement extending their Statute of Limitations beyond the ordinary three years (26 U.S.C. Sections 6501[a] and 6501[c][4]), while the corporation had not entered into any such agreement.

The Ninth Circuit held that because the corporation had not extended its own Statute of Limitations, any adjustment

to the individual taxpayers' liabilities based upon changes to the "pass-through" items generated by the corporation's income, deductions or credits were barred. Applying that holding to the case at bar, the Statute of Limitations bars the proposed adjustments. As in *Kelly*, all of the changes are generated by items shown on the tax return of a pass-through entity. Both the individuals and the entity filed tax returns. The individuals entered into agreements under 26 U.S.C. 6501(c)(4), while the entity did not. Notices of Deficiency were issued more than three years after the filing of the entity's tax return, and therefore after its Statute of Limitations had run, but while each individual's Statute of Limitations was open by agreement. As the facts are nearly identical, the result should be the same. This would be true

despite the extension of the taxpayer's own Statute of Limitations beyond the ordinary three year period because, as in *Kelly*, no changes should then be made at the entity level, the source of the income, deductions and credits. Clearly, there is a direct contradiction between the result reached by the Ninth and Second Circuits.

However, there is one factual distinction between these cases, which is of little consequence and should not mandate a different result in the case at bar. That difference involves the nature of the "pass-through" entity, in that case a corporation, in the case at bar a partnership. As discussed below, that difference is inconsequential as a matter of law.

The Eighth Circuit has also ruled favorably to the taxpayers on this issue,

laying out a broad general rule upon which the taxpayers rely. In *Fendell v. Commissioner*, 906 F. 2d 362 (8th Cir. 1990), rev'g 92 T.C. 708 (1989), the Tax Court was again reversed. This time, the Court was faced with a similar fact pattern in which the pass-through entity generating the income was a trust. The trust filed an income tax return, as required by 26 U.S.C. Section 6012(b)(4). The taxpayer in that case was a trust beneficiary, who filed his own income tax return, reflecting his own income, deductions and credits, which included, but which were not limited to, income, deduction and credits generated by the trust. Again, the individual taxpayer executed an agreement to extend his Statute of Limitations, while the trust did not execute such an agreement. More than three years after the filing of both returns the

Commissioner sought to assess additional income taxes, all of which were generated by adjustments to the trust's income, deductions and credits.

The Eighth Circuit held, in accordance with the result reached in *Kelly*, that the adjustments were barred. Because the trust had filed "a return," and more than three years had passed, the provisions of 26 U.S.C. Section 6501(a) prevented the assessment of any further tax against the trust. The Court reasoned that because the trust was a "pass-through" entity, which had tax consequences to the beneficiaries, the Statute of Limitations also barred any adjustments to the tax liability of the beneficiaries which would be generated by adjustments to the trust's income tax liability. The Court set down the following rule:

> [I]n order for the Commissioner to adjust tax liability, he must be able to do so at the source of income, here the Trust, or will be prevented from doing so at the point where the income is distributed, in this case the beneficiary of the Trust. *Fendell*, at 364.

As applied to that case, this rule barred the assessment of additional taxes against the trust beneficiaries. As applied to the case at bar, it would bar the assessment of additional taxes against the taxpayers, partners in a partnership, based upon adjustments to the income of the pass-through entity.

The Court in *Fendell* pointed out that this rule is consistent with the result in other cases involving items affecting the tax liabilities of more than one level of entities. The Court also considered a case which contested a proposed

adjustment of estate tax. The District Court barred the revaluation of gifts which appeared in a gift tax return after the running of the Statute of Limitations on the gift tax return. *Boatmen's First National Bank v. United States*, 705 F. Supp. 1407 (W.D. Mo. 1988). In that case, the Commissioner disputed the taxpayer's computation of estate tax due. The dispute was over the value of a gift, made during the decedent's lifetime, by which a portion of the unified credit for estate and gift taxes had been used up. See 26 U.S.C. Sections 2010 and 2505. More than three years after the filing of the gift tax return (which is another tax return fitting the phrase "the return" as contained in 26 U.S.C. Section 6501[a], despite the fact that, unless the amount of lifetime gifts exceeds $600,000, no tax can be shown

as due), but less than three years after the filing of the estate tax return (again "the return"), the Commissioner sought to revalue the gifts as shown on the gift tax return. The Commissioner took the position that this was not done to impose additional gift tax; rather to impose additional estate tax. The District Court held that the Statute of Limitations on a gift tax return would be meaningless unless, after three years, that return had to be accepted as filed for all purposes. It should be noted that the same Statute of Limitations, 26 U.S.C. Section 6501(a), was applicable in *Boatmen's* as is applicable in the case at bar, and that "the return" which ran the Statute of Limitations for estate tax purposes was a gift tax return.

However, the Court should be aware that the Tax Court, in a case similar to

Boatmen's, reached the opposite conclusion. It held that the Commissioner could re-value a gift for estate tax purposes subsequent to the running of the Statute of Limitations on the assessment of additional gift taxes. *Estate of Smith v. Commissioner*, 94 T.C. 872 (1990). However, that case was decided by a vote of 10 to 8, with a well reasoned and vigorous dissent. Taxpayers urge this Court to follow the reasoning contained in *Boatmen's* and amplified in the dissent to *Estate of Smith*.

In the case at bar, the Second Circuit states that the *Kelly* and *Fendell* cases are distinguishable from the case at bar. Taxpayers respectfully disagree. The Court stated that the holding of *Kelly* was based in part upon the provisions of 26 U.S.C. Section 6037(a), which provides that "[a]ny return filed

pursuant to this section shall, for purposes of chapter 66 (relating to limitations), be treated as a return filed by the corporation." *Kelly*, at 758. The Second Circuit in the case at bar relied upon the lack of similar language in 26 U.S.C. Section 6031(a) to construct a distinction. However, taxpayers respectfully disagree for several reasons. First, the Code Section dealing with the filing of income tax returns by S corporations was enacted subsequent to that dealing with the filing of income tax returns by partnerships. Taxpayers fail to understand how a subsequently enacted Code Section can be of use in interpreting a previously enacted Code Section, especially where the later statute does not refer to or have anything to do with the earlier one. The Second Circuit itself questions this type of reasoning

before doing so (*Siben*, at 103), and ignores its own precedent against doing so. *Matter of Oswego Barge Corp.*, 664 F. 2d 327 (2d Cir. 1981), rehearing denied 673 F. 2d 47 (2d Cir. 1982).

More importantly, the language in dispute is completely superfluous to the proposition it is cited for. Case law makes it clear that a partnership income tax return is sufficient to allow the Commissioner to assess a tax. In *Burk-Waggoner Oil Association v. Hopkins*, 296 F. 492 (N.D. Texas 1924), *aff'd* 269 U.S. 110, 46 S.Ct. 48, 70 L.Ed. 183 (1925), the Court permitted the assessment of corporate income tax, where the entity, relying on undisputed state law classification of itself as a partnership, took no action inconsistent with that status. In addition, there is a substantial body of administrative law,

authored by the Commissioner, which talks about taxing a partnership as if it were a corporation. See Treas. Reg. Section 301.7701-2. In such a case, the only return filed would be a partnership return, as there is nothing in these Regulations which discusses the preparation of a corporate income tax return, either by the partnership itself or on behalf of the partnership by the Commissioner (pursuant to the authority granted under 26 U.S.C. Section 6020[b]). Counsel, as set forth in his Affidavit (39a), has seen a number of Notices of Deficiency in which the Commissioner has taken the position that the entity involved was to be taxed as a corporation, where the only return filed was a partnership return.

This discussion is equally applicable to the distinction drawn by the Second Circuit between the case at bar

and the holding in *Fendell*. In *Fendell*, the pass-through entity was a trust. The trust filed Form 1041, Fiduciary Income Tax Return, while the beneficiary filed Form 1040. The beneficiaries extended their own Statute of Limitations, while the trust did not. More than three years after the filing of the returns, the Commissioner asserted a deficiency against the beneficiaries. The Eighth Circuit ruled that the Statute of Limitations barred the assessment of the tax because the income could not be taxed at the source due to the running of the source's Statute of Limitations.

The Second Circuit, in distinguishing the case at bar from *Fendell*, states that while *Fendell* contains two separate taxable entities, namely the trust and the beneficiaries, the case at bar contains only one taxable entity, the

partners. The partnership is said not to be a taxable entity, on the authority of *Estate of Klein v. Commissioner*, 537 F.2d 701 (2d Cir. 1976). However, that holding is both dicta and incorrect as a matter of law, and the taxpayers urge this Court to examine the basis of that holding. If in fact that holding is wrong, then there is a direct conflict between the holdings of *Kelly* and *Fendell*, and that of the case at bar.

In *Estate of Klein*, the taxpayer sought to utilize the provisions of 26 U.S.C. Section 6013(e)(1)(A), which provided for an "innocent spouse" to shed his or her liability for joint income taxes where, among other conditions, his or her joint income tax return omitted 25% of gross income. The issue before the Court was therefore the definition of gross income. The Court held that

gross income includes a partner's pro-rata share of partnership gross income. However, Form 1040 (drafted by the Commissioner under statutory authority) only requires the taxpayer to disclose his share of partnership net income. This led to some confusion, as the taxpayer's share of gross income from the partnership which was omitted from the return exceeded $1,000,000, while his share of net income was approximately $90,000. The Court held that the statutory definitions contained in the relevant Code Sections required it to consider gross partnership income as the amount omitted from the joint return. It concluded that the amount of gross income stipulated by the parties to have been omitted, $45,000, had to be measured against gross income of the taxpayers as computed technically, not the amount of

distributive net income required to be shown on the tax return. Since the omitted percentage of approximately 4.5% ($45,000/$1,000,000) was less than 25%, the threshold for relief set forth in the statute, the taxpayer was not entitled to relief.

However, the Court did not stop there. In considering the argument by the taxpayer that it should look at the income stated in the return which had been filed in considering how much income had been omitted from the return, the Court made a number of general statements about a partnership. It stated that a partnership is not a taxable entity. This is the basis for the Court's opinion in the instant case; however, it is clearly dicta.

This becomes clear from an analysis of 26 U.S.C. Section 6013(e), which

clearly refers to a joint income tax return. It is beyond dispute that this return must be a Form 1040. This should be contrasted with the statute in issue in this case, 26 U.S.C. Section 6501(a), which simply refers to "the return." The Ninth Circuit, in *Kelly*, states that this phrase is vague as to which return it refers to. There is nothing vague about the reference to a joint income tax return.

Further, taxpayers respectfully contend that this statement by the Second Circuit as to the nature of a partnership is incorrect as a matter of law. See discussion above concerning *Burk-Waggoner* and Treas. Reg. Section 301.7701-2. It is clear that, when it is in the interest of the Commissioner to do so, he will seek to assess a tax against a partnership.

The other rationale of the holding in *Kelly* is briefly dismissed by the Second Circuit. That rationale concerns public policy. The Ninth Circuit states that the taxpayer is dependent upon the books and records of the corporation to defend itself against a proposed assessment based upon pass-through adjustments, which the corporation has no incentive to maintain after its own Statute of Limitations expires, thereby justifying the result it reached. However, the Second Circuit states that it agrees with the Commissioner that "a taxpayer can generally protect himself by taking steps to ensure that the partnership preserves records needed to support the partnership items claimed on the individual partner's return." *Siben*, at 1037. However, there is no explanation as to how the taxpayers in the case at bar, limited partners

owning a small interest in the partnership, and who are barred by state law from taking an active role in its business affairs, are supposed to accomplish this. This is even more puzzling coming from the Commissioner, who dealt directly with the partnership on the partnership audit, and had no communication with the individual partners on the substance of the audit until the Notices of Deficiency were issued. The Court's reliance on the taxpayer's agreement to extend their own Statutes of Limitations ignores the realities of an audit. In a situation where the pass-through entity audit is not completed at the time when the individual's Statute of Limitations is about to expire, the individual is offered two choices by the Commissioner. These are: 1) to extend the Statute; or 2) to receive a Notice of Deficiency in

which the Commissioner takes the best possible position he can to protect the revenue, usually a disallowance of all deductions and credits. When faced with these two alternatives, the only rational choice is to extend the Statute.

II. THE WRIT SHOULD BE GRANTED BECAUSE OF THE IMPORTANCE OF THIS CASE WITH RESPECT TO OVERALL TAX ADMINISTRATION AS TO SIMILARLY SITUATED TAXPAYERS.

Another factor to be considered for the granting of certiorari is the number of taxpayers affected by the case at bar. *U.S. v. Donruss Co., supra.* There are literally thousands of taxpayers similarly situated to the taxpayers in the case at bar. Counsel for the taxpayers is personally aware of cases currently pending in the Tax Court where there are thousands of Petitioners who were partners in partnerships now under examination

involving pre-TEFRA tax years (see Affidavit). Many of these cases are special projects in the Tax Court. An example of this is the so-called "Elektra/Hemisphere" cases currently pending before Judge Swift. Trial of those cases would not be necessary should this Court hold that the Statute of Limitations is activated by the filing of the partnership tax returns with respect to the pass-through adjustments contained therein. "Elektra/Hemisphere" is only one such project, and there are many more cases, including those involving the various partners of Baltic, which are affected by the outcome of the case at bar.

CONCLUSION.

For the reasons set forth above, it is respectfully requested that this Honorable Court grant this Petition and issue a Writ of Certiorari to review the conclusion reached below.

Respectfully submitted,

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ENTRY OF APPEARANCE.

The undersigned, being admitted to practice before this Honorable Court, enters his appearance on behalf of the Petitioners, Gary L. Siben, Michele Siben, Sidney Siben, Stella Siben, Stephen G. Siben, Eileen L. Siben, Walter Siben and Lillian Siben.

EDWARD NEWMAN

OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN SIBEN v. COMMISSIONER.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1119 August Term 1990

Argued: February 21, 1991

Decided: April 18, 1991

Docket No. 90-4128

- X

GARY L. SIBEN, MICHELE SIBEN, SIDNEY SIBEN, STELLA SIBEN, STEPHEN G. SIBEN, EILEEN L. SIBEN, WALTER SIBEN and LILLIAN SIBEN,

Petitioners-Appellants,

-against-

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

- X

Before: FEINBERG, MINER and MAHONEY,

Circuit Judges.

On certified interlocutory appeal, petitioners, individual taxpayers, appeal from United States Tax Court decision denying summary judgment. Petitioners argue that the statute of limitations under 26 U.S.C. § 6501(a) on assessments of individual income tax arising from disallowance of partnership losses for calendar years 1979 and 1980 should be measured by partnership return instead of individual income tax return.

Affirmed.

EDWARD NEWMAN, Carle Place, NY (Newman & Cahn, Howard Philip Newman, Palm Beach Gardens, FL, of Counsel), for Petitioners-Appellants.

JANET KAY JONES, Washington, DC, Attorney, Tax Division, Department of Justice (Shirley D. Peterson, Assistant Attorney General, Gary R. Allen, Francis M. Allegra, Attorneys, Tax Division,

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for Respondent-Appellee.

FEINBERG, Circuit Judge:

Petitioners appeal from an order of the United States Tax Court denying their motion for summary judgment, but certifying the case for interlocutory appeal pursuant to 26 U.S.C. §7482(a)(2). This court granted leave to appeal in October 1990. The sole issue on appeal is whether the statute of limitations for assessing additional tax against an individual partner based on adjustments to partnership items should be measured from the date the partnership return was filed or the date the income tax return of the individual partner was filed. The Tax Court held that the controlling return was the individual income tax return. We agree, and affirm.

I. Background

Petitioners claimed losses on their individual federal income tax returns for the years 1979 and 1980 for their shares as partners of items reflected on the timely-filed returns of a calendar-year, limited partnership known as Baltic Energy Ltd. The Commissioner sought and obtained from each petitioner consent to extend the time to assess tax resulting from adjustments to petitioners' distributive shares of Baltic partnership items. Within the extended time, the Commissioner issued deficiency notices to each petitioner disallowing certain deductions attributable to petitioners' shares of Baltic partnership losses. The Commissioner neither sought nor obtained any extension of time from the Baltic partnership.

Petitioners thereafter sought re-

determination in the Tax Court of the deficiencies asserted by the Commissioner. In June 1990, petitioners moved for summary judgment on the ground that the statute of limitations for the assessment and collection of the taxes at issue was governed by Baltic's partnership return and had expired prior to issuance of the notices of deficiency. In a memorandum opinion and order, the Tax Court denied summary judgment, holding that the statute of limitations for the adjustments at issue was governed by the partners' individual income tax returns rather than by the partnership return, and had not expired. This appeal followed.

II. Discussion

The statute of limitations we are called upon to interpret provides the

following general rule:

> Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed . . . .

26 U.S.C. (Internal Revenue Code) § 6501(a). (Unless otherwise noted, all references are to the Internal Revenue Code of 1954 as amended and effective during the years in issue.) The parties agree that if "return" in the phrase, "within 3 years after the return was filed," refers to the partnership return reporting the items passed through to the partners, the assessments were barred, but if "return" refers to an individual partner's income tax return, the deficiencies were timely asserted within the statutory period, as extended by agreement with petitioners.

In interpreting § 6501(a), it appears to us that the "return" that starts the running of the limitations period at issue is that of the taxpayer whose liability is being assessed, and not that of a third person or entity whose return might also report the transaction that gives rise to the liability. On this reading, the return referred to in § 6501(a) would thus be the individual's income tax return for an assessment of individual income tax.

We do not believe that the return reporting, in the language of § 6501(a), a "tax imposed by this title" can be the partnership return, because "[a] partnership as such shall not be subject to the income tax imposed by this chapter." 26 U.S.C. § 701. Although the partnership return contains details regarding the transactions resulting in income or

loss to be divided among the partners, "[p]ersons carrying on business as partners shall be liable for income tax only in their separate or individual capacities," id., and it is the individual partner's income tax return that furnishes the information necessary to calculate that tax.

In Estate of Klein v. Commissioner, 537 F.2d 701, 704 (2d Cir.), cert. denied, 429 U.S. 980 (1976), we pointed out that a partnership

> is simply not a taxable entity under the [Internal Revenue] Code . . . . That being the case, the return required to be filed by a partnership . . . . is not an income tax return. It is essentially an information return . . . . In effect, the partnership return must be read together with, or as an adjunct to the partner's personal income tax return in order for it to have any value at all.

Thus, the partnership return does not itself report "any tax imposed by this title." Moreover, the partnership return does not furnish information necessary to calculate the individual partner's income tax, such as marital status, exemptions, and income, losses, deductions or credits derived from sources other than the partnership. In Klein, we expressly recognized that a partnership return is an "adjunct," providing information that supplements information contained in the partner's individual return. This implies that it is the individual partner's return, and not that of the partnership, upon which the partner's tax liability is determined. It follows that the filing of the individual's return starts the limitations period.

Our reading of the statute is consistent with Supreme Court cases deter-

mining whether the wrong form of return is sufficient to start the running of the statute of limitations. In Germantown Trust Co. v. Commissioner, 309 U.S. 304 (1940), for example, the taxpayer, a trust company, had filed a fiduciary return, but the Commissioner asserted that it should have been taxed as a corporation. The Supreme Court held that the fiduciary return qualified as the "return" for the purpose of triggering the statute of limitations on assessing corporate income tax because it "contained all of the data from which a tax could be computed and assessed" on the taxpayer as a corporation. Id. at 308. Conversely, in Commissioner v. Lane-Wells Co., 321 U.S. 219 (1944), the Court held that a corporate income tax return did not start the statute of limitations period for personal holding company income tax, for

which a separate return was required, because the corporate return "did not show the facts on which liability would be predicated" for personal holding company tax. Id. at 223-24. Finally, in Automobile Club of Michigan v. Commissioner, 353 U.S. 180 (1957), an organization originally determined to be exempt from tax had filed exempt-organization information returns, but the Commissioner asserted that the organization was not entitled to tax-exempt status. Because the information returns "lack[ed] the data necessary for the computation and assessment of deficiencies," the Court determined that they were not returns sufficient to start the statute of limitations period. Id. at 188.

As even petitioners appear to concede, the partnership return filed by Baltic did not provide the information

necessary to calculate the individual income tax of the Sibens, i.e., Baltic's return did not contain, in the words of Germantown Trust Co., "the data from which a tax could be computed and assessed," on the individual taxpayer. Thus, the partnership return could not qualify as the "return" under § 6501(a) to trigger the statute of limitations for assessment of individual income taxes. We note that the Seventh Circuit has reached the same conclusion. Durovic v. Commissioner, 487 F.2d 36, 38-40 (7th Cir. 1973), cert. denied, 417 U.S. 919 (1974).

Our construction of the statute is also consistent with the view of Congress. As part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 402, 96 Stat. 324, 648, Congress instituted new procedures for

determining the tax treatment of partnership items at the partnership level. The parties agree that the new provisions do not apply to the 1979 and 1980 tax years at issue in this case. However, the Conference Committee Report accompanying TEFRA also described pre-TEFRA law: "In the case of a partnership, the income tax return of each of the partners begins that individual partner's period of limitations. Except in the case of Federally registered partnerships, the date of filing of the partnership return does not affect the individual partner's period of limitations." H.R. Conf. Rep. No. 760, 97th Cong., 2d Sess. 599, reprinted in 1982 U.S. Code Cong. & Admin. News 1190, 1371. As the parties point out, the question of how much weight to accord to the views of a subsequent Congress on the meaning of earlier enactments is not

an easy one. Compare Russello v. United States, 464 U.S. 16, 26 (1983) with Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980); see also Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 117-18 & n.13 (1980). Nevertheless, we find at least some significance in the fact that our view of the meaning of the statute is in accord with the interpretation subsequently expressed by Congress.

Petitioners rely heavily on two cases in which the Commissioner was barred from asserting a deficiency against individuals for an adjustment to entity items when the statute of limitations applicable to the entity had expired. Kelley v. Commissioner, 877 F.2d 756 (9th Cir. 1989); Fendell v. Commissioner, 906 F.2d 362 (8th Cir. 1990).

However, those cases are readily distinguishable.

The issue in Kelley was the liability of individual shareholders of a subchapter S corporation for an assessment based on an adjustment to an item reported on the S corporation's return. As the court explained, a corporation that has elected to be treated as an S corporation does not generally pay income taxes at the corporate level; its income is passed through to its shareholders and reported on their individual income tax returns. Kelley v. Commissioner, 877 F.2d at 758. To determine the effect of the tax return filed by the S corporation on the statute of limitations, the Ninth Circuit analyzed 26 U.S.C. §6037, which requires an S corporation to file returns and provides that "[a]ny return filed pursuant to

this section shall, for purposes of chapter 66 (relating to limitations), be treated as a return filed by the corporation." Kelley v. Commissioner, 877 F.2d at 758. The court principally relied on that language, along with the ambiguity it perceived in § 6501(a), in holding that the statute of limitations for the adjustment of S corporation items should be measured from the date that the S corporation return was filed, even if the adjustment resulted in a tax only on the S corporation's shareholders. We note that the Tax Court disagrees with the reasoning of Kelley, and has declined to follow it in cases appealable to other circuits. Fehlhaber v. Commissioner, 94 T.C. 863, 871 (1990), appeal docketed, No. 90-5735 (11th Cir. Sept. 6, 1990).

Petitioners argue that the similarity between the tax treatment of partner-

ships and S corporations should lead us to the same conclusion as the Kelley court. However, petitioners acknowledge that the quoted language of § 6037 relating to S corporations has no counterpart in the partnership provisions at issue here. As we have previously observed, "as long as the sections of the Code governing subchapter S corporations differ from the partnership provisions, we are obliged to apply those sections differently, and taxpayers will gain or lose from those differences as the case may be." Ketchum v. Commissioner, 697 F.2d 466, 471 (2d Cir. 1982). Thus, even if we agreed that § 6501(a) was ambiguous, Kelley would not govern the statute of limitations applicable to the partnership adjustments at issue in this case.

It is true that the court in Kelley also relied on the policy consideration

that the taxpayer there could defend against the proposed adjustment "only by resort to the corporation's books and records," which the court apparently thought the corporation might not retain after the corporation's three-year period had run. Kelley v. Commissioner, 877 F. 2d at 758. But, as the Commissioner points out -- and we agree -- a taxpayer can generally protect himself by taking steps to ensure that the partnership preserves records needed to support the partnership items claimed on the individual partner's return. Cf. Fehlhaber v. Commissioner, 94 T.C. At 869-70. Moreover, petitioners' suggestion that the Tax Court's ruling is somehow unfair to limited partners like petitioners who are "at the mercy of the partnership and the Commissioner" is not overly persuasive in a case where petitioners agreed

to extend the statute of limitations for the very items at issue, but now say it has expired.

We have similar problems with petitioners' reliance on Fendell v. Commissioner, 906 F.2d 362 (8th Cir. 1990). In that case a complex trust had invested in partnerships, and claimed losses from the partnerships on its income tax return. At a time when the statute of limitations had expired for the trust, but not for the trust's individual beneficiary, the Commissioner asserted deficiencies against the beneficiary that arose from disallowing the partnership losses claimed by the trust. The Eighth Circuit held that the expiration of the trust's statute of limitations barred the adjustment to the beneficiary's return. Id. at 364.

As the <u>Fendell</u> court explained, a

complex trust and its beneficiaries are separate taxable entities. Id. at 363. The court apparently viewed the proposed adjustment as an indirect attempt to adjust the trust's income tax liability through the beneficiary, after the statute of limitations prohibited a direct adjustment. Id. at 364. This concern, however, is not applicable to the case before us. As discussed above, a partnership is not an entity separately taxable from its partners and there can thus be no suggestion that the Commissioner is attempting to adjust indirectly the partnership's tax liability by assessing tax against the partners. In any event, on the assumption that the reasoning of Fendell does not depend upon the precise facts of that case, we disagree with it for the various reasons set forth above.

We have considered all of petitioners' arguments, and we affirm the judgment of the Tax Court.

OPINION OF THE UNITED STATES TAX COURT IN SIBEN v. COMMISSIONER.

T.C. Memo. 1990-435

UNITED STATES TAX COURT

GARY L. SIBEN, MICHELE SIBEN, SIDNEY SIBEN, STELLA SIBEN, STEPHEN G. SIBEN, EILEEN L. SIBEN, WALTER SIBEN AND LILLIAN SIBEN,
Petitioners

v

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 5027-85.

Filed August 13, 1990.

Held: Petitioner's motion for summary judgment will be denied on the basis of Fehlhaber v. Commissioner, 94 T.C. __ (June 13, 1990).

Howard Philip Newman, for the petitioners

Randall L. Preheim, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION.

WHITAKER, Judge: Pending before this Court is a motion for summary judgment filed by petitioners on June 11, 1990, together with respondent's notice of objection filed on July 5, 1990. The issue before the Court involves the statute of limitations, or more precisely whether this Court should follow the decision of the Court of Appeals in Kelley v. Commissioner, 877 F.2d 756 (9th Cir. 1989), revg. T.C. Memo. 1986-405 or this Court's more recent decision in Fehlhaber v. Commissioner, 94 T.C. __ (June 13, 1990).

The parties agree that there is no genuine issue of material fact regarding the statute of limitations issue and thus summary judgment is appropriate. See Lyons v. Board of Education of

Charleston, 523 F.2d 340, 347 (8th Cir. 1975). During the years 1979 and 1980 petitioners claimed deductions on their Federal income tax returns on account of an investment in a partnership known as Baltic Energy Ltd. (hereinafter "Baltic"). Baltic is a calendar-year limited partnership. Baltic filed its 1979 partnership return on August 15, 1980, pursuant to an extension, and filed its 1980 partnership return on or before April 15, 1981. Petitioners argue that the statute of limitations with respect to an adjustment of a partner which is attributable to a partnership item expires, in general, 3 years after the date on which the partnership return was filed, or was due to be filed, unless extended by agreement. Baltic and respondent did not extend the statute of limitations. In fact, there was no occasion to take that

action since Baltic was not a taxpaying entity. Sec. 701.[1] (We note that Section 6229 is not applicable to the 1979 and 1980 years.)

Each petitioner in this case executed special consents to extend the time to assess tax on Form 872-A which extended the period for assessment with respect to the years 1979 and 1980 to a period which is 90 days after either the taxpayer or the Internal Revenue Service issued a Form 872-T or the Internal Revenue Service mailed a notice of deficiency. No Forms 872-T were issued in this case. The statutory notices issued to petitioners Sidney and Stella Siben were mailed on December 3, 1984, and to

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1 Unless otherwise noted, all section references are to the Internal Revenue Code of 1954, as amended and in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

the other petitioners on December 4, 1984. Both dates were within the period of limitations.

Petitioners rely solely on Kelley v. Commissioner, supra. In Kelley, the taxpayer-husband was a shareholder in an S corporation. The petitioners in that case had extended the statute of limitations by agreement with respondent and a notice of deficiency was issued to them with the only adjustments pertaining to pass-through items from the S corporation. The S corporation had not extended its statute of limitations. In reversing this Court, the Ninth Circuit held that the statute of limitations on adjustments derived from "pass-through" items from the S corporation expired 3 years from the filing of the corporate information return. However, this Court in Fehlhaber v. Commissioner, supra,

expressly declined to adopt the position of the Court of Appeals in Kelley on this issue. Rather we reaffirmed the position taken by this Court in Kelley. See Kelley v. Commissioner, T.C. Memo. 1986-405, revd. 877 F.2d 756 (9th Cir. 1989). Although there are distinctions between an S corporation and a partnership, the rationale of our opinion in Kelley and in Fehlhaber apply with equal force in the partnership-partner area.[2] Thus, we will follow our Court-reviewed opinion in Fehlhaber. Accordingly we hold that petitioners' motion for summary judgment is due to be denied.

We note parenthetically that when the petitions were filed in this case, all petitioners resided in Brooklyn, New York. Appeal will lie to the Court of

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2 We express no opinion on whether the rationale of the Ninth Circuit would similarly apply to a partnership.

Appeals for the Second Circuit, which has not spoken on this issue. We are not, in any event, bound to follow the views of the Court of Appeals for the Ninth Circuit. See _Golsen v. Commissioner_, 54 T.C. 742, 757 (1970), affd. 445 F.2d 985 (10th Cir. 1971).

An appropriate order will be issued.

ORDER OF THE UNITED STATES TAX COURT DENYING MOTION FOR SUMMARY JUDGMENT.

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

GARY L. SIBEN, MICHELE SIBEN, SIDNEY SIBEN, STELLA SIBEN, STEPHEN G. SIBEN, EILEEN L. SIBEN, WALTER SIBEN AND LILLIAN SIBEN,	
Petitioners,	
v.	Docket No. 5027-85
COMMISSIONER OF INTERNAL REVENUE,	
Respondent.	

O R D E R

Pursuant to the determination of this Court as set forth in its Memorandum Opinion filed August 13, 1990, it is

ORDERED that petitioners' motion for summary judgment filed June 11, 1990, is denied.

Meade Whitaker
Judge

Dated: Washington, D.C.
August 14, 1990

ORDER OF THE UNITED STATES TAX COURT GRANTING PERMISSION FOR INTERLOCUTORY APPEAL.

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

GARY L. SIBEN, MICHELE SIBEN, SIDNEY SIBEN, STELLA SIBEN, STEPHEN G. SIBEN, EILEEN L. SIBEN, WALTER SIBEN AND LILLIAN SIBEN,	
Petitioners,	
v.	Docket No. 5027-85
COMMISSIONER OF INTERNAL REVENUE,	
Respondent.	

O R D E R

Pursuant to the determination as set forth in T.C. Memo. 1990-435 petitioners' Motion for Summary Judgment filed June 11, 1990, was denied by the Court's Order dated August 14, 1990.

On August 23, 1990, petitioners filed a Motion to Amend Order Nunc Pro

Tunc in order to provide to petitioners a basis for an interlocutory appeal. Upon due consideration of said Motion and pursuant to I.R.C. section 7482(a)(2) and Rule 193, Tax Court Rules of Practice and Procedure, it is

ORDERED that petitioners' Motion is granted in that the Court's Order dated August 14, 1990, is amended by adding thereto the following two paragraphs:

> ORDERED that this case is hereby certified for interlocutory appeal to the United States Court of Appeals for the Second Circuit, in that a controlling question of law is involved with respect of which there is a substantial ground for difference of opinion and an immediate appeal from that order may materially advance the ultimate termination of the litigation. It is further
>
> ORDERED that all proceedings herein are stayed pending resolution of any

interlocutory appeal. It
is further

ORDERED that in all other respects the Court's order dated August 14, 1990, remains in full force and effect.

Meade Whitaker
Judge

Entered: SEP 17 1990

ORDER OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT GRANTING PERMISSION FOR INTERLOCUTORY APPEAL.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GARY L. SIBEN, ET AL.,

Appellants,

-against- Docket No. 90-8083

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

NOTICE OF MOTION for permission to appeal interlocutory order of U.S. Tax Court.

FILED: SEP 25 1990
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Elaine B. Goldsmith, Clerk

MOTION BY

Edward Newman, Esq.
NEWMAN & CAHN
One Old Country Road, Suite 295
Carle Place, NY 11514
(516) 741-5650

OPPOSING COUNSEL:

Randall Preheim, Esq.
Office of District Counsel
#500 1244 Speer Blvd.
Denver, CO 80284
(303) 844-2933

Has consent of opposing counsel:

A. been sought? No.

B. been obtained? No.

Has service been effected? Yes.

Was oral argument desired? No.

Has argument date of appeal been set: A. by scheduling order? No.

B. by firm date of argument notice? No.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? Yes. Stay granted by U.S. Tax Court.

Judge or agency whose order is being appealed: United States Tax Court, Judge Meade Whitaker.

Brief statement of the relief requested: Appellants respectfully request to move this Court for permission to appeal the interlocutory order issued by the Tax Court pursuant to 26 U.S.C. 7842.

Edward Newman appearing for Gary L. Siben, et al., plaintiff.

Dated Sept. 24, 1990.

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

JAMES L. OAKES

RALPH K. WINTER

10/17/90

FILED: OCT 17 1990
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Elaine B. Goldsmith, Clerk

ORDER OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 31st day of MAY, one thousand nine hundred and NINETY-ONE.

GARY L. SIBEN; MICHELLE SIBEN; SIDNEY SIBEN; STEPHEN G. SIBEN; EILEEN L. SIBEN; WALTER SIBEN; and LILLIAN SIBEN,

PETITIONERS-APPELLANTS,

v.

Docket Number 90-4128

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT-APPELLEE

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by APPELLANTS SIBEN.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSTEIN
Clerk

FILED: MAY 31 1991
UNITED STATES COURT OF APPEAL
SECOND CIRCUIT
Elaine B. Goldsmith,
Clerk

AFFIDAVIT OF HOWARD P. NEWMAN.

STATE OF FLORIDA)
ss.:
COUNTY OF PALM BEACH)

1. HOWARD P. NEWMAN, being duly sworn, according to law, deposes and says that the following facts are true based upon his own personal knowledge:

2. That he is an attorney engaged to represent the Petitioners in *Siben v. Commissioner*, Docket No. 5027-85 in the United States Tax Court, currently on appeal.

3. That he represents a number of taxpayers similarly situated to the taxpayers in the *Siben* case, in that they are limited partners who are under audit or who have filed petitions with the Tax Court for pre-TEFRA partnership years, who have extended their Statute of Limitations pursuant to Code Section 6501

(c)(4) for their Forms 1040, and where the partnership itself has not signed an agreement to extend its Statute of Limitations.

4. That he attended a conference in the Tax Court for petitioners involved in the so-called "Elektra/Hemisphere" project. At the conference, he learned from Judge Swift, who has all of these cases, that there are hundreds of taxpayers involved in that project, and that there are a number of such projects in the Tax Court.

5. That counsel for Baltic Realty, Inc. has stated that there are in excess of Five Thousand partners in various stages of administrative proceedings and litigation with the Internal Revenue Service, who have a similar issue with respect to the Statute of Limitations as do the taxpayers in *Siben.*

6. That he has been involved in tax litigation with the Internal Revenue Service on a number of occasions, and was formerly employed by the Office of District Counsel. It is his experience that, in the event an individual partner were to refuse to extend the Statute of Limitations to accommodate the pace of a partnership audit, the Internal Revenue Service would take a "protective" position and issue a Statutory Notice of Deficiency in which it would disallow all claimed deductions and credits, and, if it could reasonably take the position, add additional income to that reported on the Form 1040 in order to "protect the revenue."

HOWARD P. NEWMAN

Sworn to and subscribed before
me this 31st day of July, 1991

MARY G. NEWMAN
Notary Public, State of Florida
My Commission expires SEPT. 30, 1993

(2)

No. 91-312

In the Supreme Court of the United States

OCTOBER TERM, 1991

GARY L. SIBEN, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

ANN B. DURNEY
JANET KAY JONES
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether deficiencies in petitioners' income taxes, resulting from the Commissioner's disallowance of deductions reported by a partnership in which they were partners, are time-barred because the deficiencies were asserted within an extended limitation period agreed to by petitioners but more than three years after the partnership filed its information returns.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-312

GARY L. SIBEN, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 930 F.2d 1034. The Tax Court's memorandum opinion (Pet. App. 22a-28a) is reported unofficially at 60 T.C.M. (CCH) 524.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1991. A petition for rehearing was denied on May 31, 1991 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on August 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are partners in Baltic Realty Ltd. (Baltic), a limited partnership. On their 1979 and 1980 federal income tax returns, petitioners claimed deductions for their respective shares of losses reported on Baltic's partnership information returns filed for those same years. In conjunction with an Internal Revenue Service (IRS) audit, petitioners executed special consents to extend the statute of limitations on assessments of tax for their 1979 and 1980 taxable years. Petitioners explicitly limited these extensions to items of income or loss associated with Baltic. Since Baltic, as a partnership, is not itself a taxable entity, Baltic was not requested to execute a similar extension of the limitations period. See Pet. App. 4a, 24a-26a.

In December 1984, within the extended limitations period agreed to by petitioners, but more than three years after Baltic had filed its information returns, the IRS issued notices of deficiency to petitioners. The tax deficiencies resulted from disallowance of the deductions claimed by petitioners for the losses incurred by Baltic. Pet. App. 24a-26a.

2. After petitioning the Tax Court for a redetermination of the deficiencies asserted by the IRS, petitioners moved for summary judgment on the ground that the statute of limitations for the assessment and collection of the taxes at issue had expired prior to the issuance of the deficiency notices. Relying on *Kelley* v. *Commissioner*, 877 F.2d 756 (9th Cir. 1989), petitioners contended that the statute of limitations expired three years after Baltic filed its partnership return because the deficiencies at issue were based upon the disallowance of deductions for losses of Baltic. Pet. App. 26a.

The Tax Court denied petitioners' motion. Pet. App. 29a-30a. In doing so, the court relied upon its reviewed decision in *Fehlhaber* v. *Commissioner*, 94 T.C. 863 (1990), appeal docketed, No. 90-5735 (11th Cir. Sept. 6, 1990), in which a unanimous Tax Court held that an information return filed by a subchapter S corporation did not trigger the three-year statute of limitations on assessments of tax against its shareholders. In *Fehlhaber*, the Tax Court expressly declined to follow *Kelley* v. *Commissioner*, 877 F.2d at 759, in which the Ninth Circuit held that the filing of an information return by a subchapter S corporation triggered the statute of limitations on assessments against the shareholders. See Pet. App. 22a-28a. After certification by the Tax Court and permission from the court of appeals, petitioners appealed from the Tax Court's interlocutory order. *Id.* at 34a-36a.

3. The court of appeals affirmed (Pet. App. 1a-21a). Stating that "the 'return' " that starts the running of the limitations period in Section 6501(a) of the Internal Revenue Code "is that of the taxpayer whose liability is being assessed, and not that of a third person or entity whose return might also report the transaction that gives rise to the liability" (Pet. App. 7a), the court held that the deficiencies were asserted within the statutory period, as extended by petitioners (*ibid.*). The court based its construction of Section 6501(a) in part on the fact that a partnership is not subject to income tax and thus its informational return could not be "the return" that begins the limitations period for assessing federal income tax. The court of appeals also found its reading of Section 6501 consistent with decisions in which this Court has made clear that "the return" that starts the running of Section 6501's limitations period must con-

tain all the data necessary for the computation and assessment of the tax. Pet. App. 7a, 9a-11a citing *Automobile Club* v. *Commissioner*, 353 U.S. 180 (1957); *Commissioner* v. *Lane-Wells Co.*, 321 U.S. 219 (1944); *Germantown Trust Co.* v. *Commissioner*, 309 U.S. 304 (1940).

Because Baltic's partnership return lacked the information necessary to compute petitioners' income taxes, the court concluded that the filing of the partnership's return did not start the limitations period for assessing a tax against its partners. Pet. App. 11a-12a. The court rejected as "readily distinguishable" the two cases on which petitioners primarily relied, *Kelley* v. *Commissioner*, 877 F.2d 756 (9th Cir. 1989) (holding that expiration of the limitations period against a subchapter S corporation barred any assessment against shareholders relating to income attributed to shareholders from the subchapter S corporation) and *Fendell* v. *Commissioner*, 906 F.2d 362 (8th Cir. 1990) (holding that expiration of the limitations period against a trust barred any assessment against a beneficiary relating to income from the trust). See Pet. App. 1a-21a.[1]

ARGUMENT

The decision below correctly holds that the statute of limitations for assessing additional income tax against a partner based on adjustments to partnership income is measured from the date of filing the partner's income tax return and not from the date the partnership's return is filed. The decision is in accord with decisions of this Court and does not directly conflict with any decision of any other court of appeals. Further review is therefore not warranted.

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[1] The court also expressed doubt whether *Kelley* and *Fendell* had been correctly decided. See Pet. App. 17a, 20a.

1. Section 6501(a) of the Internal Revenue Code provides in relevant part that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed * * * and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period." Section 6501(c)(4) permits consensual extensions of this statutory period.

As the court of appeals concluded, "the return" that reports the income tax "imposed by this title," and that commences the three-year period provided by Section 6501(a), is "that of the taxpayer whose liability is being assessed, and not that of a third person or entity" (Pet. App. 7a). With exceptions not here relevant, Section 6012(a) requires "[e]very individual" with gross income for the taxable year in excess of the prevailing exemption amount to make a return "with respect to income taxes under subtitle A." 26 U.S.C. 6012(a). The income tax provisions affecting partnerships, however, are very different. The return of a partnership is a return of income, but not of income tax. The partnership return is a purely informational return. It does not provide all of the information on the basis of which an income tax can be assessed or a suit to collect an income tax can be begun. Cf. *Automobile Club* v. *Commissioner*, 353 U.S. 180 (1957).

Section 701 of the Internal Revenue Code, provides:[2]

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[2] In 1982, after the years here at issue, Congress (in Sections 401-406 of the Tax Equity and Fiscal Responsibility Act, Pub. L. No. 97-248, 96 Stat. 648-670) added Sections 6221-6232 to the Internal Revenue Code, initiating unified administrative proceedings for partnership returns, providing for notice to, and participation by, partners, the designation, responsibility, and authority of a "tax matters partner,"

> A partnership as such shall not be subject to the income tax imposed in this chapter. Persons carrying on business as partners shall be liable for income tax only in their separate or individual capacities.

Successive sections of the Internal Revenue Code provide that each partner shall take into account his distributive share of partnership accounts in determining his income (Section 702), establish the method of partnership computations (Section 703), and provide a definition of a "partner's distributive share" of partnership accounts (Section 704). See *United States* v. *Basye*, 410 U.S. 441, 448-449, 453-456 (1973). Section 6031(a) requires the partnership to make an annual information return stating the gross income and deductions of the partnership, identifying the partners, and giving "the amount of

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and specific procedures regarding the auditing and adjustment of partnership returns. (Since only partners, and not partnerships, are liable for income tax, the Commissioner asserts "adjustments" to partnership returns, rather than "deficiencies", in the event of error or omission.) The statute provides (Section 6226) for judicial review of partnership administrative "adjustments" by the Tax Court, a district court, or the Claims Court, with restriction of assessment of deficiencies against partners arising from partnership adjustments until the period for initiating judicial review has passed, or review becomes final. Section 6229 provides a three-year limitation period from the filing of the partnership return for assessments against partners, unless extended by agreement with an individual partner for himself, or by agreement with the "tax matters partner" for all partners. In the event of a notice of final administrative "adjustment", the running of the period of limitations will be suspended for the period during which judicial review may be sought, and, if sought, until it becomes final, and for one year thereafter.

the distributive share of each individual." 26 U.S.C. 6031(a). As these provisions demonstrate, partnership informational returns do not fall within the *income tax* return requirement of 6501(a), for there can be no assessment of income tax (or suit to collect income tax) against a partnership. There is no basis on which a partnership could agree to extend the statute of limitations on assessment or suit under Section 6501(a), since the statute does not apply to it.[3]

The court of appeals thus correctly held that the statute of limitations in Section 6501 did not bar the assessment of additional income taxes against petitioners for the taxable years 1979 and 1980. See also *Durovic* v. *Commissioner*, 487 F.2d 36, 38-40 (7th Cir. 1973) (partnership's informational return does not commence the limitations period for individual tax returns), cert. denied, 417 U.S. 919 (1974).

2. Petitioners assert (Pet. 8-27) that the decision in this case conflicts with *Kelley* v. *Commissioner*, 877 F.2d 756 (9th Cir. 1989), involving shareholders of a subchapter S corporation, and *Fendell* v. *Commissioner*, 906 F.2d 362 (8th Cir. 1990), involving

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[3] Notwithstanding these explicit provisions, petitioners invoke the decision of this Court in *Burk-Waggoner Oil Ass'n* v. *Hopkins*, 269 U.S. 110 (1925). That case involved "an unincorporated joint stock association" (269 U.S. at 110) characterized as a partnership under Texas law. Under provisions now appearing as Section 7701(a)(2) and (3) the Court held that the organization was an association taxable as a corporation. Cf. *Morrissey* v. *Commissioner*, 296 U.S. 344 (1935). The decision has no bearing upon whether partnerships are taxable entities under Section 701 of the Code.

the beneficiary of a complex trust.[4] We believe that *Kelley* and *Fendell* are erroneous.[5] Because the income tax treatment of partnerships differs from the treatment afforded to S corporations and trusts, however, there is not a clearly articulated, direct conflict between *Kelley* and *Fendell* and the decision in this case.

a. Sections 1371-1379 (1976) (Subchapter S of Chapter 1) of the Code permit certain small business corporations with a limited number of shareholders and only one class of stock to elect, with unanimous consent of shareholders, to have taxable income or net operating loss of the corporation treated as income or loss of the shareholders rather than of the corporation. Under Section 1378, however, the corporation will be taxed on net capital gains in excess of $25,000; it will be taxed on its entire taxable income if an attempted election does not meet the requirements of Section 1372; and it will be taxed on its entire taxable income if the corporation itself does not fulfill all of the requirements of Section 1371. Section 6037 requires that each purported S corporation file an annual return of income that will serve as both an information return with respect to its shareholders and its own corporate tax return with respect to income taxable under Section 1378, if an attempted election does not meet the requirements of Section

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[4] A complex trust is a trust that is not required to distribute all of its income currently. See 26 U.S.C. 651(a), 661(a).

[5] The Tax Court, in a unanimous reviewed decision, has refused to follow *Kelley* in cases other than those appealable to the Ninth Circuit. *Fehlhaber* v. *Commissioner*, 94 T.C. 863 (1990), appeal pending, No. 90-5735 (11th Cir.).

1372, or if the corporation itself fails to meet the qualifications required by Section 1371.

In the *Kelley* case, shareholders in an S corporation consented to the extension of the statute of limitations with respect to the 1980 taxable year, but the Commissioner neither requested nor obtained such consent from the S corporation. More than three years after the returns of the shareholders and the S corporation had been filed, but within the extended period consented to by the shareholders, the Commissioner asserted deficiencies against the shareholders arising from the disallowance of deductions claimed on their individual returns that resulted from losses of the S corporation. The court of appeals relied on language in Section 6037 [6] to hold that, since the S corporation had not agreed to extension of the statute of limitations, Section 6501 barred the assessment of a deficiency against the shareholders attributable to income or loss derived from the corporation.[7] We

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[6] Section 6037 describes the return filed by an S corporation, for purposes of "limitations," as "a return filed by the corporation under Section 6012." 26 U.S.C. 6037. Section 6012 requires the filing of returns by corporations that are "subject to taxation under subtitle A." 26 U.S.C. 6012(a)(2).

[7] Corporate dividends are perhaps the most common form of derivative income. They are taxable to the recipient shareholder only to the extent that they either are distributed out of the earnings and profits of the corporation accumulated since February 28, 1913, or out of the earnings and profits of the taxable year. See Sections 301(a) and (c) and 316(a). It is thus obvious that the taxable status of a current dividend may depend upon an analysis of earnings and profits for many years prior to the year at issue. See, *e.g.*, *Commissioner* v. *Munter*, 331 U.S. 210 (1947); *Commissioner* v. *Goldwyn*, 175 F.2d 641 (9th Cir. 1949). See *Helvering* v. *Canfield*, 291 U.S.

believe that the decision is erroneous, and that Section 6501(a) provides a statute of limitations for assessments of deficiencies on "the return" of the *taxpayer*, and not on the return of some *other* entity (*e.g.*, partnership or subchapter S corporation) from which the taxpayer has derived income or deductions. Unlike the case of a partnership, however, the S corporation files a return that reports not only income or loss attributable to its stockholders but also income that is (or may be) taxable to it. By contrast, the return of a partnership is purely informational because the partnership is not taxable in any context, and the return it files reports no tax attributable either to itself or to its constituent partners. Cf. *Automobile Club* v. *Commissioner*, 353 U.S. at 188.
~~and the operation of Sections 666 and 667, how-~~

b. The *Fendell* case, which involved the beneficiary of a complex trust, followed the pattern of the *Kelley* case, and the court of appeals invoked the *Kelley* decision as authority. See 906 F.2d at 364. A trust is an entity subject to the income tax applicable to individuals (Section 641) and is required to file an annual return of its income and tax (Section 6012(a)(4) and (b)(4)). The distribution of income by a complex trust gives rise to a deduction for the trust (Section 661) and gross income for the beneficiary (Section 662). Due to the definition and effect of "distributable net income" in Section 643 and the operation of of Sections 666 and 667, how-

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163 (1934). It has never been suggested that the statute of limitations that would bar assertion of a deficiency against the corporation would bar the assertion of a deficiency against a shareholder with respect to a current dividend the taxable status of which required an analysis of earnings and profits for many years in the past.

ever, the amount of the deduction and income are not always the same.

As in *Kelley*, the Commissioner in *Fendell* obtained a consent to extension of the statute of limitations from the trust beneficiary, but did not seek or obtain an extension from the trust. Also as in *Kelley*, the Commissioner asserted a deficiency (resulting from disallowance of deductions relating to distributed trust income) against the beneficiary during the extended period.

In *Fendell*, as in *Kelley*, we believe that the court of appeals erred in concluding that the deficiency asserted against the beneficiary was barred under Section 6501. Whether trust income, S corporation income or partnership income is received by a taxpayer, "the return" referred to in Section 6501(a) is the return of the taxpayer and not the return of some other entity. But, in *Fendell*, the trust is subject to income tax and, unlike a partnership, files a return showing its own tax liability as well as serving as an informational return with respect to distributions to beneficiaries. Thus, additional issues are presented in both *Kelley* and *Fendell* that are not pertinent to the present case and were therefore neither presented nor considered in the court of appeals. In this context, it cannot be said unequivocally that a direct conflict exists among these decisions, although, in our view, a conflict in reasoning and in principle is plainly present.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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